Yian Sdn Bhd v Datuk Bandar Kuala Lumpur & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2-25-84 OF 1993
ABDUL KADIR SULAIMAN J
7 JUNE 1999

Administrative Law *— Remedies — Certiorari — Application to quash decision of planning authority — Hearsay evidence submitted — Allegations on affidavit by applicant remain unrebutted — Whether court entitled to conclude that allegations were accepted — Whether application should be allowed*

The applicant was the registered proprietor of Lot 930. The second respondent was the registered proprietor of Lots 928, 929 and 931 situated immediately adjoining Lot 930. On 4 January 1993, the applicant received a notice under r 5(2) of the Planning Development Rules 1990 from the first respondent informing that an application had been received from the second respondent for permission to develop its three lots by constructing on them a 15-storey hotel and to have the condition of land use changed from housing to commercial. The applicant was given 14 days to submit objection on the proposal. On 14 January 1993, the applicant forwarded its objection. The applicant attended a hearing on 26 April 1993. The second respondent was not present but was subsequently heard separately where the applicant was not given the opportunity to appear at that hearing. On 16 June 1993, the applicant received a notice stating that the application by the second respondent was approved by the first respondent at a meeting held on 20 May 1993. The applicant filed a notice of motion applying for an order of certiorari to quash the decision of the first respondent on the grounds, inter alia: (i) late notification of the decision contravening r 6(2) of the Planning Development Rules 1970; (ii) there was no local plan for the area concerned. Therefore, under the proviso to sub-s (4) of s 22 of the Federal Territory (Planning) Act 1982, the first respondent could not approve the application of the second respondent; and (iii) by not having both parties together at the hearing, the first respondent had acted contrary to natural justice. The first respondent who held office at the material time and made the impugned decision did not himself file any affidavit opposing the application of the applicant or in any way defending his action in granting the application of the second respondent. Instead, one Hj Mokhtar bin Long, the Pengarah Perancang Jabatan Perancang dan Kawalan Bangunan Dewan Bandaraya Kuala Lumpur filed in all affidavits on his behalf. The applicant submitted that the various affidavits by Hj Mokhtar on behalf of the first respondent opposing the applicant's application was inadmissible and ought to be rejected, they being hearsay evidence. There being no evidence coming forward from the first respondent himself in defence of his impugned decision, the orders of certiorari and mandamus ought to be granted.

Held, allowing the application:

The decision challenged was that of the first respondent. He was the one who by s 22 of the 1982 Act was required to make the decision. Now that his decision was challenged, it was for him, and him alone who should meet this challenge to justify his action. He had the personal knowledge of the facts in issue. But he chose not to do so. Instead, Hj Mokhtar who had no personal knowledge over the reasons behind the decision arrived at by the first respondent in granting planning approval to the second respondent, chose to do so on behalf of the first respondent. He had no personal knowledge of the considerations upon which the decision of the first respondent was based. To that extent, the evidence attempted by Hj Mokhtar to justify the action of the first respondent was clearly pure hearsay and was worthless as evidence to be admissible and should be disregarded for the purpose of this proceedings. Consequently, the allegations on affidavit by the applicant remained unrebutted. As such, the court was entitled to conclude that the first respondent had accepted those allegations. Therefore, the application for certiorari to quash the impugned decision was allowed (see p 616E–I); *Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* [1997] 2 MLJ 17 followed.

[Bahasa Malaysia summary

Pemohon merupakan seorang tuan punya tanah yang berdaftar bagi Lot No 930. Penentang kedua merupakan tuan punya tanah yang berdaftar bagi Lot-lot 928, 929 dan 931 yang terletak betul-betul bersempadan dengan Lot 930. Pada 4 Januari 1993, pemohon telah menerima notis di bawah k 5(2) Kaedah Rancangan Pembangunan 1970 daripada penentang pertama yang memaklumkan bahawa suatu permohonan telah diterima daripada penentang kedua meminta kebenaran untuk membangunkan ketiga-tiga lotnya dengan membina di atas lot-lot tersebut sebuah hotel 15-tingkat dan untuk menukar keadaan kegunaan tanah tersebut daripada perumahan kepada perusahaan. Pemohon telah diberi 14 hari untuk menghantar bantahan terhadap cadangan tersebut. Pada 14 Januari 1993, pemohon telah mengemukakan bantahan beliau. Pemohon telah menghadirkan diri di perbicaraan yang diadakan pada 26 April 1993. Penentang kedua tidak menghadirkan diri pada perbicaraan tersebut tetapi telah kemudiannya didengari secara berasingan di mana pemohon tidak diberi peluang untuk menghadirkan diri di perbicaraan tersebut. Pada 16 Jun 1993, pemohon telah menerima suatu notis yang menyatakan bahawa permohonan oleh penentang kedua telah diluluskan oleh penentang pertama di dalam mesyuarat yang telah diadakan pada 20 Mei 1993. Pemohon telah memfailkan suatu notis usul memohon suatu perintah certiorari untuk membatalkan keputusan penentang pertama atas alasan, antara lain: (i) kelewatan pemakluman tentang keputusan tersebut melanggar k 6(2) Kaedah Rancangan Pembangunan 1970; (ii) tidak ada pelan

tempatan untuk kawasan yang terlibat. Oleh itu, di bawah proviso kepada sub-s (4) kepada s 22 Akta (Perancangan) Wilayah Persekutuan 1982, penentang pertama tidak boleh meluluskan permohonan penentang kedua; dan (iii) dengan ketidakhadiran kedua-dua pihak di perbicaraan tersebut, penentang pertama telah bertindak bertentangan dengan keadilan asasi. Penentang pertama yang mememegang jawatan pada setiap masa material dan telah membuat keputusan yang dipersoalkan itu sendirinya tidak memfailkan apa-apa afidavit yang membantah permohonan pemohon tersebut atau dengan apa cara mempertahankan tindakan beliau di dalam meluluskan permohonan penentang kedua tersebut. Sebaliknya, seorang bernama Hj Mokhtar bin Long, Pengarah Perancang Jabatan Perancang dan Kawalan Bangunan Dewan Bandaraya Kuala Lumpur telah memfailkan semua afidavit-afidavit bagi pihaknya. Pemohon menghujahkan bahawa beberapa afidavit oleh Hj Mokhtar bagi pihak penentang pertama membantah permohonan pemohon tidak boleh diterima dan patut ditolak, memandangkan ia merupakan keterangan dengar cakap. Dengan tiadanya keterangan yang datang daripada penentang pertama sendiri di dalam mempertahankan keputusannya yang dipersoalkan, maka perintah-perintah certiorari dan mandamus patut diberi.

Diputuskan, membenarkan permohonan tersebut:

Adalah jelas bahawa keputusan yang dicabar tersebut adalah daripada penentang pertama. Beliau adalah pihak yang diperuntukkan oleh s 22 Akta 1982 tersebut yang dikehendaki membuat keputusan. Memandangkan kini keputusan beliau telah dicabar, adalah untuk beliau, dan beliau seorang yang perlu menghadapi cabaran tersebut untuk memberi justifikasi terhadap tindakan beliau. Beliau mempunyai pengetahuan peribadi tentang fakta yang dipersoalkan. Tetapi beliau memilih untuk tidak berbuat sedemikian. Sebaliknya, Hj Mokhtar yang tidak ada pengetahuan peribadi terhadap alasan-alasan kepada keputusan yang dicapai oleh penentang pertama di dalam memberikan kelulusan perancangan tersebut telah memilih untuk berbuat demikian bagi pihak penentang pertama. Beliau tidak mempunyai pengetahuan peribadi mengenai pertimbangan dalam mana keputusan oleh penentang pertama adalah diasaskan. Setakat ini, keterangan Hj Mokhtar yang cuba menjustifikasikan tindakan penentang pertama adalah dengan jelas dengar cakap dan tidak berguna sebagai keterangan yang boleh diterima dan hendaklah tidak dihiraukan bagi tujuan prosiding ini. Akibatnya, pengataan-pengataan pada afidavit oleh pemohon masih tidak dipatahkan. Oleh demikian, mahkamah berhak untuk memutuskan bahawa penentang pertama telah menerima pengataan-pengataan tersebut. Justeru itu, permohonan untuk certiorari untuk membatalkan keputusan yang dipersoalkan itu telah dibenarkan (lihat ms 616E–I); *Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* [1997] 2 MLJ 17 diikut.]

Notes

For cases on certiorari generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 135–306.

Cases referred to

Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin [1997] 2 MLJ 17 (folld)

Legislation referred to

Federal Territory (Planning) Act 1982 s 22, (4)
Federal Territory (Planning) (Zoning and Density) Rules 1985 r 2
Planning Development Rules 1970 rr 5(2), (4), 6(2)

PG Lim (*Alex Chang* with her) (*Alex Chang & Co*) for the applicant.
Nanthabalan (*Trevor George De Silva* with him) (*Shook Lin & Bok*) for the first respondent.
CT Annathurai (*A Gunarajah* with him) (*Hamzah Sulaiman & Partners*) for the second respondent.

Abdul Kadir Sulaiman J: The applicant is the registered proprietor of Lot No 930 Section 53, Jalan Ceylon, Kuala Lumpur in the Mukim of Wilayah Persekutuan ('the said Lot 930'). The second respondent is the registered proprietor of Lots 928, 929 and 931 situated immediately adjoining the said Lot 930 of the applicant. One Ms Lim Phaik Gan was the Managing Director of the applicant company. By a notice dated 27 April 1992 (exh 'LPG-1') Lim Phaik Gan in her personal capacity was informed by Jabatan Perancang & Kawalan Bangunan of the first respondent that it has received an application from the second respondent for the proposed development of a 15 storey hotel with car parks on its three lots mentioned earlier. Lim Phaik Gan, described in the notice as the owner of the said Lot 930 based on the record kept by the first respondent, was invited by the said notice to put forward her views within 30 days of the receipt of the said notice in connection with the proposed development by the second respondent on its lots. On 28 May 1992 having obtained an extension of time to file the objection over the proposed development of the second respondent, Lim Phaik Gan, on behalf of the applicant informed the first respondent of the objection of the applicant providing the grounds thereof (exh 'LPG-3'). The applicant heard nothing from the first respondent until January 1993, when Lim Phaik Gan, again described as the owner of the said Lot 930, received a fresh notice under r 5(2) of the Planning Development Rules 1970 dated 4 January 1993 from the first respondent informing her that an application has been received from the second respondent for permission to develop its three lots by constructing on them a 15 storey hotel (4 star) consisting of 250 rooms on the 6th to 15th floors, recreational facilities on the 5th floor and car parks at 2nd to the 4th floors. Lim Phaik Guan was also informed that the second respondent also applied to have the condition of land use changed from housing to commercial. She was given 14 days to submit her objection on the proposal. This notice is

exhibited as 'LPG-4'. On 14 January 1993 exhibited as 'LPG-5' the applicant forwarded its objection under cover of a letter signed by Lim Phaik Gan as its director. By a notice under r 5(4)of the Planning (Development) Rules 1970 dated 20 April 1993 addressed to Lim Phaik Gan, this time in her capacity as an advocate and solicitor, she was invited to attend a hearing on 26 April 1993 at 3.30pm at the premise of the first respondent to hear her objection over the two proposals of the second respondent. She attended the said proceedings on behalf of the applicant. The second respondent, however, was not present but was subsequently heard separately by representative of the first respondent where the applicant was not given the opportunity to appear at that hearing. The hearing was conducted by the Pengarah Perancang dan Kawalan Bangunan of the first respondent and its officers. Following the said hearing, Lim Phaik Gan on 16 June 1993 received a notice dated 15 June 1993 from the said Pengarah Perancang dan Kawalan Bangunan that the application by the second respondent for the proposed revised development was approved by the first respondent at a meeting held on 20 May 1993. There was annexed to the notice what purports to be a copy of the grounds of decision of the first respondent in Lampiran I made under s 22 of the Federal Territory (Planning) Act 1982. A copy of the notice of 15 June 1993 is exhibited as 'LPG-7'. It is as follows:

Akta 267
Akta (Perancangan) Wilayah Persekutuan 1982
Kaedah Rancangan (Pembangunan) 1970

Kaedah 6(2)

Pemberitahuan Keputusan Datuk Bandar
Kuala Lumpur
Terhadap Permohonan Kebenaran Rancangan

Jabatan Perancang & Kawalan Bangunan
Tingkat 8, Bangunan Dewan Bandaraya
Jalan Raja Laut
KUALA LUMPUR.

Bil Surat Kami (50) dlm DBKL JP&KB 1258162/1 15 Jun 1993

Kepada:

Puan Lim Phaik Gan
Peguambela & Peguamcara
9, Jalan Ceylon
50200 Kuala Lumpur

Dengan hormatnya saya di arah merujuk kepada bantahan tuan mengenai permohonan berikut:

I Menukar kegunaan tanah daripada kediaman kepada perdagangan

II Satu blok hotel 15 tingkat (4 Bintang) mengandungi 250 bilik.

Di atas lot/lot-lot No 928, 929 dan 931 Jalan Ceylon
Seksyen 53
Kuala Lumpur.

2 Adalah dimaklumkan bahawa permohonan di atas telah dipertimbangkan oleh Datuk Bandar Kuala Lumpur di mesyuaratnya pada 20 Mei 1993 A

3 Datuk Bandar telah memutuskan seperti berikut:
(Rujuk lampiran I)

Sekian, harap maklum.

Yang Benar, B

(Haji Mokhtar Long Idris)
Pengarah Perancang
b/p Datuk Bandar Kuala Lumpur

The said lampiran I is unsigned and purportedly to be the grounds of decision of the first respondent approving the application of the second respondent. It is as follows: C

LAMPIRAN I

(a) Datuk Bandar telah mengambil perhatian dan menimbangkan dengan teliti bantahan bertulis dan bantahan lisan yang diterima daripada pemilik lot 930 dan lot 126. D

(b) Datuk Bandar telah mengkaji dengan teliti cadangan yang dikemukakan. Semua aspek berkaitan dengan corak pembangunan sedia ada yang diluluskan dan sistem jalanraya/lalulintas telah dibincangkan dengan mendalam.

Datuk Bandar mengambil perhatian akan lokasi tapak yang terletak berhampiran dengan zon pejabat Jalan Raja Chulan/Persiaran Raja Chulan dan pembangunan bangunan-bangunan tinggi yang sedia ada di kawasan ini seperti Regency Towers dan Bolton Court dan juga beberapa lagi pembangunan ketumpatan tinggi yang telah diluluskan di kawasan berhampiran. Datuk Bandar berpendapat bahawa ciri-ciri kawasan ini telah banyak berubah untuk pembangunan intensiti/ketumpatan tinggi dan kurang sesuai untuk pembangunan berbentuk ketumpatan rendah atau 'low rise'. E F

Datuk Bandar juga mengambil perhatian bahawa Jalan Ceylon pada masa ini didapati agak sempit untuk menampung laluan kenderaan sebagai jalan pintas ke kawasan Bukit Bintang. Bagaimanapun Datuk Bandar dimaklumkan bahawa ada cadangan untuk melebarkan rezab Jalan Ceylon kepada 66 kaki untuk menampung penambahan laluan kenderaan di kawasan ini. G

(c) Setelah mengambilkira semua aspek, Datuk Bandar berpendapat bahawa pembangunan hotel 15 tingkat yang dicadangkan adalah didapati sesuai untuk kawasan ini. Oleh itu Datuk Bandar memutuskan supaya permohonan ini diluluskan.

The applicant is unhappy with this decision of the first respondent approving the application of the second respondent ('the impugned decision'). Having obtained the necessary leave of the court, the applicant on 18 October 1993 filed a notice of motion applying for the following reliefs: H

(a) an order of certiorari to quash the impugned decision of the first respondent; I

(b) an order of mandamus or alternatively an order under the Specific Relief Act 1950 directing the first respondent:

A (i) to exercise his discretion according to the law pursuant to s 22 of the Federal Territory (Planning) Act 1982 and rr 5 and 6 of the Planning (Development) Rules 1970 and r 2 of the Federal Territory (Planning) (Zoning and Density) Rules 1985 and/or to obey the Kuala Lumpur Comprehensive Development Plan.

(ii) to cancel/retract the impugned decision.

B

Firstly, the applicant objected over the late notification of the decision of the first respondent to the applicant being in contravention of r 6(2) of the Planning Development Rules 1970 which states as follows:

> The Authority (the first respondent) shall if there are objections to the
> C application within two weeks after the hearing under r 5(4) convey the decision to the applicant and those persons who had filed their objections.

In this case the hearing was conducted on 26 April 1993 before the officers of the first respondent and the approval of the application of the second respondent was purportedly made by the first respondent at a meeting on
D 20 May 1993. But the applicant received exh 'PGL-7' together with lampiran I only on 16 June 1993 which is well beyond the prescribed period of two weeks allowed by r 6(2) of the Rules. Next, it is contended that there is no local plan for the Bukit Ceylon area. Therefore, under the proviso to sub-s(4) of s 22 of the Federal Territory (Planning) Act 1982 the first respondent cannot approve the application of the second respondent. The
E first respondent can only reject or suspend such application until the local plans for the area have been prepared and adopted. It is further said that the first respondent has no power to change the approved and gazetted density of any land nor the basis of calculating the population density of any proposed development contrary to the approved and gazetted structure Plan of Kuala Lumpur. Such development proposal of the second
F respondent would have inevitably involved an increase in density given the number of persons who may at any time be occupying the hotel proposed to be built by the second respondent on the three lots adjoining the said Lot 930 of the applicant.

It was also the contention of the applicant that by not having both
G parties, the objectors and the second respondent together at the hearing, the first respondent had acted contrary to natural justice by depriving the applicant of the opportunity of listening to and replying to the submissions by the second respondent in support of its application for approval of the first respondent. Also by the process of the hearing conducted by the Pengarah Perancang dan Kawalan Bangunan the first respondent finally
H made the impugned decision. The applicant attacked this whole process as being flawed, unfair and in breach of natural justice.

The following are grounds as set out by the applicant on which the above reliefs are sought:

I (a) The first respondent has acted without any or sufficient or reasonable grounds and/or taking irrelevant considerations into account and/or failing to take relevant considerations into account and/or has reached his decision in a manner that is irrational, including:

Particulars

(i) failed to take into account that the existing width of the roads, the drainage system, the water supply and the electricity supply are all insufficient and without making sufficient plans and arrangements for widening the roads, upgrading the drainage system, water supply and electrical supply before approving the Revised Development Proposal;

(ii) failed to take into account that the set-back of the existing buildings is too close to the edge of the roads notwithstanding the road reserve of apparently 66 feet and in view of this, that it would be impossible to widen the existing roads;

(iii) taking into account the consideration that the Revised Development proposal is satisfactory and consistent with the Bukit Ceylon area in view of the fact that the surrounding areas had other buildings of high density WHEREAS on the contrary he failed to take into account that the emergence of the Revised Development Proposal in the Bukit Ceylon area, which adjoined the area around Jalan Raja Chulan and Jalan Pudu, which were highly congested and overly concentrated with large commercial buildings of high density that had already been erected or approved and which were in the process of being built, would cause, and aggravate further existing traffic, noise and environmental pollution problems;

(iv) acted on the basis of 'plot ratio' which was unsuitable for assessing the impact of the Revised Development Proposal on the existing drainage system, water supply, electric supply, traffic, noise and environmental degradation.

(b) has misconstrued the scope and effect of his statutory discretion under the whole of the Federal Territory (Planning) Act 1982 from the decision making process in respect of the decision of the first respondent dated 20 May 1993 (in particular s 22 thereof) as well as rr 5 and 6 of the Planning Development Rules 1970 as well as r 2 of the Wilayah Persekutuan (Planning) (Zoning and Density) Rules 1985 and finally the Comprehensive Development Plan of Kuala Lumpur.

(c) has acted contrary to natural justice and/or procedure by depriving the adjoining owners the opportunity of replying to the submission of the second respondent in support of its application when the officers who conducted the hearing on 26 April 1993 did not allow the applicant to be present whilst the evidence and submissions of the second respondent as developer were given.

(d) has unlawfully and without authority approved the said application for the Revised Development and/or approved the Revised Development Proposal without taking into account any and each of the matters raised by the applicant in its grounds of objection dated 14 January 1993 or alternatively by assigning little or no weight to those matters.

(e) has failed or neglected or omitted to take into account that the infrastructure facilities of Bukit Ceylon were designed and installed for a lower population density and for small scale, low rise development.

(f) has failed to provide for a master plan or a local plan before proceeding to consider and approve the Revised Development Proposal and thereby approved the development without any fixed and mature policy, thereby resulting in a conflict with, and non-compliance with, the duties visited

upon the first respondent by s 6 of the Federal Territory (Planning) Act 1982, the provisions of which obliged the first respondent to plan and arrange beforehand the overall development in the Federal Territory of Kuala Lumpur.

(g) has acted in excess of or without jurisdiction or misapplied his statutory discretion under s 22 of the Federal Territory (Planning) Act 1982.

(h) generally acted in breach of the principles of natural justice in the conduct of the hearing under r 5 of the Planning (Development) Rules 1970 on 26 April 1993 at which the applicant was present but not together with the second respondent:

Particulars

(i) allowing a number of persons who were present during the hearing to enter and leave the room in which the hearing was conducted at will, and subsequently requesting for advice from the said persons or any or more of them in circumstances where the advice that was given would be based on an impression of the proceedings that was incomplete and inaccurate in view of the fact that of their absence at certain specified time;

(ii) allowing the hearing under the said r 5 to be conducted by the Ketua Pengarah Jabatan Perancangan Bangunan and a certain number of assistants who subsequently prepared a report for the first respondent, and thereby resulting in the first respondent acting upon evidence and submissions that were not observed in person and without giving himself an opportunity to form his own impression;

(iii) not conducting the hearing within the time frame stipulated by r 5(4).

It was indeed a serious allegation made against the first respondent in the exercise of his discretion in granting the application of the second respondent. If unrebutted it would result in the applicant succeeding in its application by this notice of motion for certiorari. The first respondent who held office at the material time who made the impugned decision to grant the planning permission to the second respondent did not himself file any affidavit opposing this application of the applicant or in any way defending his action in granting the necessary application sought by the second respondent. Instead, one Haji Mokhtar bin Long, the Pengarah Perancang Jabatan Perancang dan Kawalan Bangunan Dewan Bandaraya Kuala Lumpur filed in all five affidavits on his behalf, respectively on 8 June 1994 (in encl 12), 17 August 1994 (in encl 20), 15 September 1994 (in encl 22), 25 March 1996 (in encl 37) and 26 March 1996 (encl 39).

As early as 28 September 1994, the applicant through the second affidavit of Lim Phaik Gan (in encl 23) at para 16 thereof deposed as follows:

> The decision that the applicant is seeking to impugn is a decision of the Datuk Bandar himself made on 20 May 1993. The whole of the evidence in answer to the applicant's case is put forth by Haji Mokhtar bin Long Idris, the Ketua Pengarah, Jabatan Perancangan dan Kawalan Bangunan. He vouches for what the Datuk Bandar supposedly did or did not take into account. This is hearsay.

In response to this, Haji Mokhtar by his affidavit filed only on 25 March 1996 deposed as follows: A

> Berhubung dengan perenggan 16 Affidavit Kedua PG Lim tersebut, saya ingin menegaskan bahawa saya, selaku Pengarah di Jabatan Perancang dan Kawalan Bangunan adalah diberikuasa di bawah Akta Wilayah Persekutuan (Perancangan) 1982 melalui pemberitahuan Warta No 103561/82 untuk mengendalikan kesemua tugas-tugas yang merangkumi s 22 Akta tersebut dari secara tersiratnya termasuk memberi jawapan melalui Affidavit bagi pihak Datuk Bandar Kuala Lumpur. B

In short the deponent is saying that they know what they are doing. In any event there is no such relevant gazette notification as cited by Haji Mokhtar in the said affidavit. Be that as it may, about a year later, there appeared to C be a change in the stand taken by the first respondent concerning his evidence in this proceeding relating to this application of the applicant. On 15 April 1997, the first respondent filed a further affidavit (in encl 57) affirmed by Dato' Paduka Dr Mazlan bin Ahmad who was the Datuk Bandar of Kuala Lumpur from 15 November 1992 until 13 December D 1995. Inter alia, the deponent deposed that Haji Mokhtar, by virtue of Gazette Notification No 10361/1987 is given the power, inter alia, to conduct the proceedings on 26 April 1993 (the objection proceedings). It is further deposed that Haji Mokhtar was given the power to depose the various affidavits on behalf of the first respondent mentioned earlier. It is further explained by Dato' Paduka Dr Mazlan in his affidavit that at the E material time it was considered not necessary for the first respondent himself to affirm an affidavit in this proceeding relying on the High Court decision in Originating Motion No R1-25-118-92 (*Zain Azahari bin Zainal Abidin v Datuk Bandar Kuala Lumpur*). However, in the light of the Court of Appeal decision in that case in Civil Appeal No W-04-35-94 (*Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* decided on F 17 February 1997 (subsequently reported as [1997] 2 MLJ 17) requiring the personal affidavit of Datuk Bandar in such a matter, it became necessary for him now to affirm this affidavit in the capacity of the first respondent. Consequently by para 12 he deposed as follows:

> Selaras dengan itu, saya ingin menyatakan dan mengesahkan bahawa kesemua fakta-fakta dan perkara-perkara yang dinyatakan di dalam Affidavit-Affidavit En Mokhtar bin Long Idris tersebut adalah benar dan betul. G

As such he urged upon the court to accept in whole the various affidavits of Haji Mokhtar in this proceedings for the purpose of supporting and to justify his (first respondent's) decision to grant the development approval to H the second respondent in relation to the three lots. Following an application made by the applicant by summons in chambers filed on 20 May 1997 in encl 61 to have the said further affidavit of Dato' Paduka Dr Mazlan expunged from the record of the proceeding, this court on 30 June 1997 allowed the applicant's application in the said summons. On 29 July 1997 the first respondent filed an appeal with the Court of Appeal against the said I decision. Consequently, I have to reserve my decision on the present application of the applicant for certiorari and mandamus as the decision of

A the Court of Appeal would have a bearing on the decision to be made. However, when this application of the applicant came up for mention on 21 January 1999, the court was told that the first respondent had withdrawn his intention to appeal against my decision to the Court of Appeal. Therefore, I am now in a position to make a decision on this application of the applicant for certiorari and mandamus and to provide reasons for it.

B Before me, Dato' PG Lim counsel for the applicant on the authority of the Court of Appeal decision in *Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* [1997] 2 MLJ 17 submitted that these various affidavits by Haji Mokhtar on behalf of the first respondent opposing this application of the applicant is inadmissible and ought to be rejected, they being hearsay C evidence. There being no evidence coming forward from the first respondent himself in defence of his impugned decision of 20 May 1993, the orders of certiorari and mandamus sought in this present application by the applicant ought to be granted. There is no evidence coming from the first respondent that in making the impugned decision he exercised his discretion in accordance with law. That case cited has some similarity with D the present case affecting the applicant. The impugned order of the first respondent was made pursuant to s 22 of the Federal Territory (Planning) Act 1982 after properly delegating the power to conduct the inquiry which was carried out on 26 April 1993 even though the applicant was not happy with the way the inquiry was conducted in that both parties, ie the applicant and the second respondent were not together at the said inquiry to enable E the applicant to test the strength of the evidence for the second respondent. Be that as it may, Haji Mokhtar, the person who headed the inquiry panel then prepared a report to the first respondent. The applicant challenged the adequacy of the report and yet the report has never been placed in evidence. This piece of evidence is very relevant as forming the basis upon which the F first respondent is to act under s 22 of the 1982 Act for the decision is that of the first respondent and not by anyone else. Section 22 as pointed out by the Court of Appeal at p 27 confers upon the first respondent the power to grant or refuse planning permission in respect of any development. Planning permission may be granted conditionally or unconditionally. In order to make any decision at all either way, which in this case, favouring G the second respondent, there has to be evidence coming from the first respondent, the decision maker, as to the matters that were taken into account by him in making the decision in the way he did. On this issue, the Court of Appeal said at p 32 as follows:

> H Third and lastly, a public decision-maker whose exercise of discretion is questioned must meet the challenge by adducing relevant evidence and admissible evidence. Applications for certiorari and other relief specified in para 1 of the Schedule to the Courts of Judicature Act 1964 are normally contested on affidavit evidence. As a general rule, where an applicant files an affidavit alleging that a particular decision was not arrived at in accordance with law, eg because the decision-maker had taken into account irrelevant I matters, it is incumbent upon the particular decision maker in the usual way to affirm and file an affidavit rebutting the allegation and setting out those matters which led him to make the impugned decision. Of course, procedurally speaking, no power in the court to direct a party to affirm and file

an affidavit. Parties to a litigation have conduct of their case and the court cannot compel either side to file affidavits. See *Minister of Labour, Malaysia v Sanjiv Oberoi* [1990] 1 MLJ 112. A

There may, of course, be good reasons for the absence of an affidavit from the particular decision-maker, eg because he is dead. Or it may be a case where an affidavit from the decision maker is unnecessary. Thus, a Chairman of the Industrial Court is not expected to file an affidavit in rebuttal to an application to quash his award. B

But, where no cogent reasons are proffered by way of admissible evidence for the absence of such an affidavit, the general rule will apply with full force. Consequently, where allegations on affidavit are unrebutted by the party against whom they are made, a court is entitled to conclude that those allegations have been accepted. See *Rama Chandran*, per Edgar Joseph Jr FCJ at p 229. C

There is another aspect to this principle. It is that the affidavit, in order to amount to a satisfactory rebuttal, must be affirmed by the person who has personal knowledge of the facts in issue. In cases where the exercise of discretion by a public decision-maker is challenged, in the absence of those special circumstances which we referred to a moment ago, *the rebuttal must come from the decision-maker himself. An affidavit by a deponent who has no personal knowledge of the considerations upon which the decision was based is Pure hearsay and is worthless as evidence and no court can be expected to pay the slightest attention to it.* (Emphasis added.) D

Applying the above principle enunciated by the Court of Appeal to the facts of the present application of the applicant, it is clear that the decision challenged is that of the first respondent. He was the one who by s 22 of the 1982 Act is required to make the decision. Now that his decision is challenged, it is for him, and him alone who should meet this challenge to justify his action. He has the personal knowledge of the facts in issue. But he chose not to do so. Instead Haji Mokhtar, who had no personal knowledge over the reasons behind the decision arrived at by the first respondent in granting planning approval to the second respondent chose to do so on behalf of the first respondent. He had no personal knowledge of the considerations upon which the decision of the first respondent was based. To that extent the evidence attempted by Haji Mokhtar to justify the action of the first respondent is clearly pure hearsay and is worthless as evidence to be admissible and should be disregarded for the purpose of this proceedings. To that extent I agree with the submissions of the learned counsel for the applicant that these various affidavits by Haji Mokhtar on behalf of the first respondent opposing this application of the applicant is inadmissible and ought to be rejected, they being hearsay evidence. Having discarded the so called evidence on behalf of the first respondent proffered by Haji Mokhtar through his various affidavits, the allegations on affidavit by the applicant remain unrebutted. As such, I am entitled to conclude that those allegations have been accepted by the first respondent. Having come to that conclusion, I have no alternative but to allow this application of the applicant for certiorari to quash the impugned decision of the first respondent made on 20 May 1993 whereby the first respondent had wrongly approved an application by the second respondent for planning E F G H I

permission to built a 15 storey hotel on the three lots adjoining the said Lot 930 of the applicant. I cannot agree with the submission made by En Nanthabalan, counsel for the first respondent which submission is supported by En Annathurai, counsel for the second respondent, that the applicant had waived the irregularity by subsequently affirming and filing three further affidavits in reliance upon the various affidavits of Haji Mokhtar on behalf of the first respondent. I am of the view which I hold that there can be no waiver over matters which are inadmissible. It is illegal for the court to act on inadmissible evidence. Inadmissible evidence remains so even if no objection is taken by the opposite party. In the circumstances of the case, the court is left to decide the matter in this proceedings on such admissible evidence only which is that of the applicant. The end result is that the challenge by the applicant over the impugned decision made by the first respondent remained unrebutted. The evidence put forward by the applicant before this court particularly the grounds of objection of the applicant submitted to the first respondent prior to the inquiry held on 26 April 1993 exhibited as 'LPG-3' are not at all hollow.

As the impugned decision of the first respondent is quashed, the prayer for mandamus or in the alternative for an order under the Specific Relief Act 1950 directing the first respondent to exercise his discretion according to law pursuant to s 22 of the 1982 Act and rr 5 and 6 of the Planning Development Rules 1970 and r 2 of the Federal Territory (Planning) (Zoning and Density) Rules 1985 and/or to obey the Kuala Lumpur Comprehensive Development Plan would no longer be an issue for the court to resolve.

In the final analysis, this application by the applicant for certiorari to quash the decision of the first respondent of 20 May 1993 succeeds and the said decision is accordingly quashed. Costs of this application to the applicant against the first and the second respondents.

Application allowed.

Reported by Jafisah Jaafar